No. 2923

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARIAM A. PATTERSON and
H. J. PATTERSON,
Appellants,

vs.

EDWARD STROECKER, as Trustee of the Estate of H. J. Patterson, a Bankrupt,
Appellee.

BRIEF FOR APPELLEE.

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Filed this.....day of June, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Argument.

The *question* for decision upon the record in this case is, whether or not the *deed* conveying his one-fourth interest, made by Patterson to his wife on November 27, 1911, carried with it an assignment or conveyance of the *sub-lease* made by Patterson to Hamilton prior to the execution of the deed by Patterson to his wife, under which *sub-lease* Patterson retained 5 per cent. of the *gross* output of the *whole* claim.

Our contention is that the trial Court correctly held said 5 per cent. was not conveyed by the deed, but remained the property of Patterson, constituting *assets* of Patterson which passed to his insolvent estate upon his voluntary bankruptcy; and that the appellee, as his trustee in bankruptcy, was entitled to recover that 5 per cent. for distribution among Patterson's creditors.

The sub-ject matter of the deed by Patterson to his wife is thus described in that deed, viz:

> "All his right, title and and interest, *being* an undivided *one-fourth* interest in and to that certain bench placer mining claim situate in the Fairbanks Precinct, Alaska * * *" (Tr. 74-75).

FORMER DECISION OF THIS CIRCUIT COURT OF APPEALS (STROECKER v. PATTERSON ET AL., 220 FEDERAL 21) IS THE LAW OF THIS CASE; AND HOLDS THAT THE DEED BY PATTERSON TO HIS WIFE DID NOT CONVEY THE 5 PER CENT ALONE INVOLVED ON THIS APPEAL.

Upon a *former trial,* at the conclusion of the evidence of plaintiff, the Court below made a decree *dismissing* the action; upon appeal to this Court that decree was *reversed* in an opinion written by Circuit Judge Ross, concurred in by Circuit Judge Gilbert and District Judge Wolverton, and is reported as Stroecker v. Patterson et al., 220 Fed. 21 (No. 2411, in this Court).

The decision of this Court on that appeal, we assert, is decisive of and the *law of that case* upon the present appeal.

The *facts* of the case developed upon that trial are identical with the facts proved upon the present trial so far as concerns the question now before the Court for decision and the sufficiency of the evidence to support the Court's holding that the deed by Patterson to his wife neither conveyed nor in anywise affected the right of Patterson to retain the 5 per cent of the gross output under Patterson's lease and agreement with Wickersham and his sub-lease to Hamilton.

These facts Judge Ross clearly collated and stated in his opinion upon the former appeal, as follows:

> "Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.
>
> Ross, Circuit Judge. This suit was brought by the trustee of the estate of a bankrupt to set aside a conveyance made by him to his wife of an undivided one-fourth interest in a certain placer mining claim called Pat Daly Bench, situate on Ester creek, Alaska, on the ground of alleged fraud in the making of such conveyance, and also to restrain the defendants, husband and wife, from demanding and receiving from the lessee of the entire claim 5 per cent. of the gross output of the gold thereof—the complaint alleging, among other things, in substance, that on the 27th day of November, 1911, the defendant H. J. Patterson, being then insolvent and unable to pay his then creditors, for the purpose of hindering, delaying and defrauding them, executed to his wife, the defendant, Mariam A. Patterson, a deed conveying all of his interest, to wit, an undivided one-fourth, of the mining claim mentioned, which his said wife took and since holds in trust for her husband, to aid him in cheating his creditors;

that prior to that alleged fraudulent conveyance the husband held a lease of the whole of the said mining claim, which lease he, prior to his adjudication in bankruptcy, assigned for a valuable consideration to one H. C. Hamilton, who is still the owner and holder thereof, and under which he is mining the said claim upon the terms and conditions of the original lease thereof to H. J. Patterson, and of the sublease of the latter to him; that under such terms and conditions the defendant H. J. Patterson was entitled to receive from Hamilton's operations of the property 5 per cent. of the gross output of the ground; that the interest of the said H. J. Patterson under the lease has never been assigned to any one; that his wife, the said Mariam A. Patterson, claims to be the assignee of all benefits under the lease, and to be entitled to receive the said 5 per cent. of the gross mineral output of the claim, by virtue of the alleged fraudulent conveyance made to her by her husband of his undivided one-fourth interest in the claim; that on or about May 8, 1912, Hamilton made his first clean-up of the dump extracted by him from the claim during the spring of 1912, and that at the time of such clean-up the defendants Patterson demanded of him the payment of 5 per cent. of the gross output thereof, which demand was refused by the said Hamilton, who still has the said 5 per cent. of the output in his possession, and that the said Hamilton will, from time to time as the said winter dump is cleaned up, have other sums of money realized therefrom, 5 per cent. of which the defendants Patterson will claim and receive from the said Hamilton, unless restrained therefrom by the court; that the said Mariam A. Patterson is insolvent, and that if she secures possession of the said 5 per cent. of the gross output of the claim the same will be lost to the creditors of her husband

and to the trustee, plaintiff in the suit; that the said Mariam A. Patterson has no right to or interest in any of the said gold, and that the plaintiff, as such trustee, is entitled to receive the said 5 per cent. of the gross output of the claim, to be applied towards the payment of the creditors of the said bankrupt. The prayer of the complaint is for the appointment of a receiver to take and receive the said 5 per cent. of the gross output of the claim until the title thereto can be determined, or that the same be ordered paid into the registry of the court; for a temporary order restraining the defendants Patterson, their agents, etc., from demanding or receiving any portion of the said 5 per cent. of the said gross mineral output; and for a decree adjudging the deed from the husband to his wife fraudulent and void, and that the defendant Mariam A. Patterson convey the said undivided one-fourth interest in the said claim to the plaintiff, as trustee of the creditors of the defendant bankrupt.

The husband and wife answered separately. The answer of the wife, among other things, denied that the deed from the husband to her was made for any fraudulent purpose, and in effect set up that on the 19th day of September, 1910, James Wickersham was the sole owner of the said mining claim, and on that day entered into an agreement with the said H. J. Patterson, whereby he agreed to convey to the said Patterson an undivided one-fourth interest in the claim, if Patterson would sink a hole upon the claim to bed rock, and do the assessment work thereon for the year 1910, to which conditions the latter consented, "but desired to use what money he had for other purposes, and therefore, with the knowledge and consent of the said Wickersham, agreed with this defendant (the wife) that, if she would pay with her own funds the expense of sinking such

hole to bed rock and of doing said assessment work, she should be entitled to receive and would receive a conveyance of said quarter interest, instead of said H. J. Patterson"; that in pursuance of the agreement last mentioned the defendant Mariam A. Patterson did, at her own expense, cause to be sunk, on the 20th and 21st days of September, 1910, a hole to bed rock, and did cause to be done upon the said claim the assessment work for the year 1910, for all of which work she paid to the persons doing the same the sum of $225, all of which was her separate property, in which her husband had no interest; that before Wickersham had time to execute a deed conveying a quarter interest in the claim, as he had agreed to do, he left Alaska, and did not return until late in the fall of 1911, at which time her husband requested him to convey the said quarter interest to her, "upon the ground that she had performed the conditions of said contract, but the said Wickersham preferred to, and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant (the wife), and delivered the same to said H. J. Patterson on or about the 10th day of November, 1911, but with the express understanding, had between the said Wickersham and the said H. J. Patterson, that the latter would convey the bare legal title to said quarter interest so received by him to this defendant (the wife); that thereafter, when this defendant learned that said deed had been made and delivered to said H. J. Patterson, she demanded from him a conveyance of the legal title to her in pursuance of his said agreement with her, whereupon said H. J. Patterson did, on the evening of November 27, 1911, by deed convey to this defendant the legal title to said quarter interest then held by him", which interest she has ever since owned, and now own, and in which her husband

never had any interest, except the bare legal title. The answer of the husband was substantially to the same effect. Both answers denied that the conveyance in question was made for any fraudulent purpose.

The record shows that on the coming on of the cause for trial the plaintiff introduced in evidence the contract between Wickersham and H. J. Patterson, the lease made by the former to the latter of the entire claim, the sublease of the claim by Patterson to Hamilton, the conveyance from H. J. Patterson to his wife, Mariam A. Patterson, and the oral testimony of H. J. Patterson and of two other witnesses, John Junkin and E. R. Peoples. Upon the conclusion of that evidence the court below granted the defendants' motion to dismiss the suit, and in its judgment dismissing it appears the following respecting the 5 per cent. of the gross amount of gold taken from the claim by the lessee, Hamilton:

'And it further appearing from the records of this action that, on the 17th day of May, 1912, an order was made in this cause, directing H. C. Hamilton, as lessee of the Daly Bench, described in the complaint herein, [to] deposit with the clerk of this court 5 per cent. of the gross amount of gold mined by him upon said mining claim during the pendency of this action, as royalty accruing to the owner of the undivided one-fourth interest in said Daly Bench, the title to which is in controversy in this action, to be held to await the determination thereof, and that the value of the said 5 per cent. of the gross amount of gold so mined by the said Hamilton is $5,174.66. It is further ordered that, in the event that, within ten days from the date of this judgment the plaintiff has not filed with the clerk of this court a supersedeas bond, approved by the court, for an appeal from this judgment, the

clerk of this court pay to the said Mariam A. Patterson, or her attorney, A. R. Heilig, the said sum of $5,174.66, if said gold dust or money has been deposited with him, and that, if the said Hamilton has deposited said gold dust with the American Bank of Alaska, then said bank pay said sum to the said Mariam A. Patterson, or her said attorney.'

The contract of September 19, 1910, between Wickersham and H. J. Patterson, after reciting the ownership and possession by Wickersham of the claim, and the desire of Patterson to prospect it and to take a lease thereof for its future working, provides, among other things that:

'In consideration of the sinking of a hole from the surface to bed rock thereon, for the purpose of prospecting the said ground and determining its value, by the party of the second part [Patterson] at his own expense, the party of the first part [Wickersham] does hereby agree to make, sign and deliver to the party of the second part a quitclaim deed to an undivided one-fourth interest in the said premises. The party of the second part undertakes hereby, in consideration of said agreement and transfer, to sink said hole upon the said premises, and to do the assessment work for the year 1910 without any expense whatever to the party of the first part. In further consideration of the rents, royalties, covenants, and agreements hereinafter reserved, and by the said party of the second part to be kept, paid, and performed, the party of the first part does hereby grant, demise, let, and lease unto the said party of the second part the whole of the said premises together with all the appurtenances. * * * And in consideration of the said demise the said party of the second part does covenant and agree to and with the said party of the first part as follows, to wit: To enter upon

said demised premises within a reasonable time after the signing and sealing of these presents, and to dig, excavate, bore, or otherwise sink one hole from the surface to bed rock upon said claim, for the purpose of prospecting the said ground and doing the assessment work for the year 1910.'

Under and pursuant to that lease Patterson, according to the evidence, caused two holes to be sunk on the claim, the first to bed rock at a depth of 100 feet, and the second to a depth of 125 feet. He then left the Daly Bench claim and went elsewhere to work. Thereafter, and in the year 1911, the holders of a mining claim called Happy Home Association claim, which adjoined the Daly Bench claim, took possession of the latter, claiming it to be a part of their claim; and such was the condition of affairs on the return of Wickersham to Alaska; the dispute being compromised in and by a written agreement executed November 8, 1911, by the holders of the Happy Home location on the one part, and by Wickersham and H. J. Patterson on the other, which compromise awarded to the Happy Home claimants a strip only of the Daly Bench claim.

Shortly before the execution of that compromise agreement, to wit, October 12, 1911, Wickersham had executed to H. J. Patterson a second lease of the Daly Bench claim for a term extending to October 12, 1915, reciting, among other things, the ownership by Wickersham of the undivided three-fourths thereof and the ownership by H. J. Patterson of the remaining one-fourth, and reciting that Patterson had applied to Wickersham for a lease covering the entire claim upon certain terms and conditions, which Wickersham thereby granted; the instrument further reciting, among other things, that:

'As part consideration of this lease the party of the second part [H. J. Patterson] agrees

that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease, and shall also at all times be subject to any debts, defaults, or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease; and it is especially agreed that the party of the first part [Wickersham] shall have a first lien upon the whole of the output of the whole of the Daly claim, *including the undivided one-fourth interest of the party of the second part,* for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease.'

The last-mentioned instrument further imposed upon the lessee the obligation to begin work upon the leased property within 30 days from its execution, and thereafter to continuously maintain possession of the property and mine the same in a good and minerlike manner, and, among various other terms and conditions, the following:

'And the party of the second part [H. J. Patterson] does hereby *specially agree not to assign this lease or lay, or any interest therein or thereunder,* and not to sublet or sublease the said demised premises, or any part thereof, *nor to permit the same,* nor any part thereof, *nor any interest therein, to pass to any other person whatever, without the written consent* of the party of the first part [Wickersham] had and obtained, and *this prohibition shall extend to the undivided one-fourth interest belonging to the party of the second part as fully as to the interest belonging to the party of the first part.'*

The deed from Wickersham to H. J. Patterson of the one-quarter interest in the claim was

made October 14, 1911, and contained this recitation:

'Said conveyance is made in consideration of the doing of the assessment work thereon by the vendee in the year 1910, in compliance with the United States statute.'

That deed was recorded at the request of Patterson. The deed from the latter to his wife was made November 27, 1911, expressing a consideration of $1 and quitclaiming to her 'all his right, title, and interest, being an undivided one-fourth interest', in the Daly Bench claim. That *deed did not purport to convey to the defendant Mariam A. Patterson any part of her husbands' interest in the amount then due or afterwards to become due to him from Hamilton under the lease* by which the latter worked the ground, *and certainly did not convey to her any part of* the 5 per cent. *of the gross mineral output* which was *derived from the undivided three-fourths* of the claim owned by Wickersham. It is therefore impossible to sustain the judgment of the court below, awarding to the defendant Mariam A. Patterson the whole of the 5 per cent. of the mineral output of the claim realized by Hamilton in the working of the claim under the lease assigned to him."

COURT'S CONCLUSION ON THESE FACTS.

The *conclusion* of this Court upon these facts, *reversing* the decree dismissing appellee's action, is thus stated by Judge Ross (italics ours), viz.:

"*That deed* did *not* purport to *convey* to the defendant Mariam A. Patterson *any part* of her *husband's interest* in the amount due or afterwards to become due to him from Hamilton *under the lease* by which the latter worked the

> ground, and *certainly did not convey to her* any part of the 5 per cent. of the *gross mineral output* which was derived from the undivided three-fourths of the claim owned by Wickersham. It is *impossible to sustain the judgment* of the Court below, awarding to the defendant Mariam A. Patterson the whole of the 5 per cent. of the mineral output of the claim realized by Hamilton in the working of the claim *under the lease assigned to him"* (Stroecker v. Patterson, 220 Fed. 21, 25-26).

Every material and substantial fact and word of evidence, in relation to this point, viz: that the deed from Patterson to his wife did not transfer any interest in or under the lease (as of course, under the Wickersham lease and agreement with Patterson, the deed could not—Transcript, 49 to 55 and 56 to 64, especially page 62), was in evidence and before the trial Court and this Court on the *former* appeal; and that decision is necessarily the *law of the case* upon the *same* facts and evidence *now* before this Court on the present appeal.

1. The *pleadings* on both appeals are exactly the *same;*

2. The *two leases* and agreements between Wickersham and Patterson, one of September 19, 1910, and the other of October 12, 1911, are the *same;*

3. The agreement settling the *dispute* as to part of Daly claim on settlement of Wagner et al., claiming part of mine with Wickersham and Patterson, the same;

4. Deed of Wickersham to Patterson, same;

5. Assignment of lease by Patterson to Hamilton, same;

6. Deed of Patterson to his wife, the appellant, same;

7. Patterson's testimony.

Here, on *both* appeals, are found the identical, same *documentary* evidence, and the same and only important witness, Patterson, by whom the *assignment of lease* to Hamilton reserving this 5 per cent. to himself was made, and who afterwards made the deed to his wife.

The *issues* raised by the pleadings upon the *first* trial of the case below were *all the same* on the retrial; the *documentary* evidence, leases, assignment, agreements, deeds, etc., were *all the same* on the second trial, with the *addition only* of two bank books, bank check and note *relating only* to the proof that the money paid to *drill* the holes to bedrock was paid by *Mrs.* Patterson and was her *separate* property; the *testimony* of Patterson on the retrial the *same,* with the addition of *Mrs.* Patterson's testimony on the retrial cumulative of her husband's; and the *result* of the *new* trial being a judgment that *Mrs.* Patterson owned under the deed to her subject to all the leases, agreements and assignment to Hamilton, *only* the *undivided quarter interest,* conveyed to her by the deed of Patterson, but *not* any part of the *five* per cent. reserved to Patterson under the assignment of the lease to Hamilton; and that *Patterson* was the owner, when he was adjudged bankrupt, of the

5 per cent. reserved to Patterson under the assignment by him of the leases, etc., to Hamilton.

To illustrate the case made upon the first and second trials, we state in brief form, from the record on the former and the present appeals, the following:

1. The *answer* of Mariam A. Patterson (Tr. 15), expressly declares

> "that after Wickersham returned to Fairbanks, said H. J. Patterson requested him to make a deed conveying said *quarter* interest *to* this defendant (Mariam) upon the ground that *she* had performed the conditions of said *contract,* but the said Wickersham *preferred to,* and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant, and *delivered* the same to said H. J. Patterson on or about the 10th day of November, 1911, *but with the express understanding* had between the said Wickersham and the said H. J. Patterson at the time of such delivery, *that the latter would convey the bare legal title to said quarter interest* so received by him *to this defendant"* (Tr. 15).

The answer of Patterson is the same (Tr. 20-23).

2. *H. J. Patterson,* her husband, testified:

> "I asked Wickersham for a half interest *and* a lay on the claim; he refused, but offered me a quarter interest *and* a 75% lay on the *whole* claim; we agreed to *that* proposition. * * * I told Mrs. Patterson * * * that if she wanted to pay for sinking the drill hole to bedrock, that *she* could have *the quarter interest;* if we struck pay *I* would *need all* the money *I* had *to open up* the ground, and she was willing to take the chance" (Tr. 94-95).

This agreement and lease will be found at pages 49 to 55 of the transcript.

Patterson continues:

"I did nothing under *the lease part* of the agreement, with the result that Wickersham forfeited the lease. I then secured a *new lease,* but had to consent to a great many things before I got it. *I considered a* 75% *lay* on the ground very much *more* valuable *than a quarter interest in* the property; *I* was particularly *concerned* about the *lease* on the property. * * * Wickersham told me, 'You have forfeited your *lease,* but I will give *you* the quarter *interest* any time, but if you get the *new lease* you will *have to undertake* certain obligations; those obligations are set forth in the *lease* of October 12, 1911, *and* the *agreement* (Tr. 56-69) made at the time (Tr. 96).

"I asked him to make the *deed* to Mrs. Patterson, because, as I told him, she had paid for sinking the drill holes. He *didn't* do that and stated as his reason, 'I don't want to mix things up. *I want to do* business with *you.* I will give *you the deed* (Tr. 69) and you can make *the deed* to whoever you like'. * * * I transferred or assigned the *lease* (Tr. 71-73) to Henry C. Hamilton" (Tr. 97-98).

"On the 27th day of November, 1911, I executed a *conveyance of this quarter interest* to my wife" (Tr. 100).

"*Under the lease* I had spent *a good deal of money of my own* * * * *prior* to the time I delivered the *deed* to Mrs. Patterson, * * * something over $1400; * * * none of that money was Mrs. Patterson's (Tr. 117).

"There was *no assignment of this lease or my interest* in this lease, *to* Mrs. Patterson, No, there has *never been any assignment* in any other way of any interest in this lease to Mrs. Patterson" (Tr. 126).

3. *Mariam A. Patterson* testified:

"Judge Wickersham did not consent to give him a *half* interest, but told him he would give him a *quarter* interest *and* a 75% *lay;* then as he had only a very little money himself and he wanted to use that for working purposes, for mining purposes, he told me that if I would pay for sinking the holes, do the work necessary to acquire *the quarter* interest, that he would give me *the quarter* interest; so I consented. * * * We thought *the quarter* interest, if there was anything in it at all, would be cheap at that. * * * After he got to town *he phoned me* that the judge *wasn't* willing *to make the deed in my* name. * * * I regarded myself as entitled to have the deed *to the quarter* interest * * * in paying for the work necessary to acquire *the quarter* interest" (Tr. 149-151).

"I presume I did say when my deposition was taken * * * that *I did not* have anything to do with *the gold produced after the lease was assigned* over to Mr. Hamilton and that *my consent* was *not* asked at the time of the assignment *of the lay* to him" (Tr. 157).

"I *permitted* my husband *to sign his* name to instruments in evidence here *in* which it is stated that *he is the owner* of the property" (Tr. 161).

Patterson also testified on the *first trial:*

"Mr. Pratt. Q. *Since* that time (November 27, 1911, the date of *her* deed) it has been worked upon a lay?

A. Yes.

Q. A *lease?*

A. Yes.

Q. And the royalties accruing to a *one-quarter interest* have amounted to over five thousand dollars, haven't they?

A. I believe they have.
Q. The royalty to *one-quarter* being five per cent.?
A. Yes."
(Tr. No. 2411, *former* Appeal, p. 33.)

And, on former trial, Transcript, page 36, *Patterson* testified that the *deed* to his wife was:

"A. Well, it was merely a transfer."

Patterson, on pages 37 and 38, Transcript, former trial, testified:

"Q. Mr. Patterson, in addition to the title to one-quarter of the Daly Bench which you had on the 27th of November, 1911, you *also* had a *lease* upon the whole claim, did you not?
A. Yes. I made an assignment of the lease to Mr. Hamilton, and also the deed on that day. I had the lease.
Q. And you reserved five per cent. royalty to yourself, did you not?
A. Five per cent. to the quarter interest.
Q. You reserved it to yourself, did you not?
A. Well, yes, for that quarter interest.
Q. Mr. Hamilton went ahead and worked the ground under that lease, did he not, paying five per cent. into Court in this case under the injunction order?
A. Yes, sir.
Q. And the money is now in this Court?
A. Yes, sir" (Tr. No. 2411, former appeal, pp. 37-38).

The witness, *E. R. Peoples*, testified, as quoted in the opinion of this Court, as follows:

"Q. Just tell what you did after you ascertained that that *transfer* had been made *from* Judge *Wickersham to Mr. Patterson*. A. I

> *asked Mr. Patterson* if he would not give us *security on his interest* in this ground. * * * Q. Is that the Daly Bench that you are referring to? A. Yes, sir; and *he informed me at that time that through an arrangement with Mr. Wickersham that he couldn't give any security on that ground or transfer it in any manner.* That was the sum and substance of the conversation. * * * I suggested to him that he had a quarter interest in that, and he should put it up as security. * * * The reason he gave me for not putting it up was that he had a written agreement * * * with Judge Wickersham *whereby he couldn't incumber it''* (220 Federal 21, 27).

Patterson testified on present trial:

> "Q. You knew that Henry Hamilton was, in other words, stepping into your shoes so far as that lease was concerned?
>
> A. Practically. I considered it so'' (Tr. 117-118).
>
> "Q. What were you to get for the lease?
>
> A. I was to get the difference between the Smith lease and the Hamilton lease, *five* per cent.
>
> Q. You were to get a *secret* five per cent.?
>
> A. Yes, sir'' (Tr. 118).

And he testified that he never before mentioned that he was to get a *secret five* per cent., although he had been previously sworn and examined in his bankruptcy proceeding (Tr. 121-127); and asserts that this *secret* five per cent. was not transferred to his wife (Tr. 125); and that *no assignment* of the lease or of his interest in the lease was ever made to his wife, and that at the present time, as far as the papers go, *he owns five* per cent.

of the gross output under the Hamilton assignment (Tr. 126).

Patterson *never mentioned* this secret five per cent. on the *first* trial.

In her *answer,* Mrs. Patterson alleges:

> "8. That during the time said H. J. Patterson held the bare legal title to said quarter interest *he made a lease* thereof to H. C. Hamilton, *reserving for said quarter interest* as rent or royalty *five* per cent. of the gross output of gold mined by said Hamilton from said mining claim during the term of such lease; that this *defendant has assented to such lease* and the rents and *royalties therein reserved,* and *by virtue of her ownership of said quarter interest she is entitled* to receive five per cent. of the gross output of gold mined by said Hamilton, as rent or royalty, at each and every cleanup" (Tr. 16).

Patterson's answer is the same (Tr. 22).

The truth and the facts are, that this lease by Patterson to Hamilton does *not* reserve anything *for the quarter interest;* but expressly *does reserve five* per cent. *to Patterson* himself (Tr. 73; 71-73).

And in *her* answer she says that *she assented* to said lease to Hamilton (Tr. 16).

The *trial* Court had *dismissed* the action, and entered judgment that the plaintiff was *not entitled to any part* of the relief he prayed, *one part* of which was that the 5 per cent. belonged to Patterson and *not* to his wife, and the plaintiff contended that as trustee of his bankrupt estate he was

entitled to recover the 5 per cent. for Patterson's creditors.

Upon this state of the case and the contentions of the parties, *this* Court held:

> "*That deed* did *not* purport to *convey* to the defendant Mariam A. Patterson, *any part* of her *husband's interest* in the amount due or afterwards to become due to him from Hamilton *under the lease* by which the latter worked the ground, and *certainly did not convey to her* any part of the 5 per cent. of the *gross mineral output* which was derived from the undivided three-fourths of the claim owned by Wickersham. It is *impossible to sustain the judgment* of the Court below, awarding to the defendant Mariam A. Patterson the whole of the 5 per cent. of the mineral output of the claim realized by Hamilton in the working of the claim *under the lease assigned to him*" (Stroecker v. Patterson, 220 Federal 21, 25-26).

Among the findings *of facts,* made by the lower Court upon the *retrial,* the Court found:

> "10. That the said H. J. *Patterson did not at any time assign, transfer, or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton,* wherein said H. J. Patterson reserved to himself five per cent. of the gross output of said claim, *and no transfer of said five per cent. of the gross output of said claim was ever made by* said H. J. Patterson to said Mariam A. Patterson" (Tr. 40).

And among the conclusions of law the Court found:

> "(1) That the deed from H. J. Patterson to Mariam A. Patterson of an undivided one-

quarter interest in and to said Daly Bench vested in said Mariam A. Patterson the legal title to said property *subject to the terms and conditions of that certain lease* from James Wickersham to H. J. Patterson dated 12 October, 1911, *and no royalties were reserved to the owner of said* undivided *one-quarter interest* in said Daly Bench under the terms and conditions of said lease (Tr. 42).

"(2) That five per cent of the gross output of the gold and gold-dust extracted from said Daly Bench, reserved by said H. J. Patterson, in his contract with H. C. Hamilton, dated 27 November, 1911, *was reserved* to said H. J. Patterson *as lessee* of said Daly Bench *and not as the owner of an interest therein.*

"(3) That the *deed* from H. J. Patterson to Mariam A. Patterson, dated 27 November, 1911, *did not transfer* to said Mariam A. Patterson any part of *the five* per cent. of the gross output of the Daly Bench, reserved by said H. J. Patterson under his contract with H. C. Hamilton, of even date therewith, and said Mariam A. Patterson acquired no right, title, or interest in or to said five per cent. of the gross output of said claim under and by virtue of the terms of said deed from said H. J. Patterson.

"(4) That said Mariam A. Patterson has no right, title, or interest in or to any part of the gold or gold-dust, or the proceeds thereof, now in the registry of this court in this cause, the same being the proceeds of five per cent. of the gold and gold-dust extracted from said claim and washed from the pay-gravels therein contained, in the year 1912.

"(5) That all the moneys and gold-dust now in the registry of this court in this cause are the property of the plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, and should be paid and delivered

to plaintiff herein, to be disposed of by him in the manner directed by law, in his representative capacity as trustee for said creditors.

* * * * * * *

"(7) That said Mariam A. Patterson, under the deed from H. J. Patterson to herself, dated 27 November, 1911, received the legal title to said undivided one-quarter interest in and to said Daly Bench claim, subject to all the burdens theretofore placed upon the same by her said agent H. J. Patterson, and said Mariam A. Patterson under and by virtue of said deed did not acquire any right, title, or interest in or to any of the royalties, moneys, or gold-dust reserved to said H. J. Patterson under and by virtue of the lease to said H. J. Patterson from James Wickersham, or the transfer thereof to said H. C. Hamilton and the agreement with H. C. Hamilton, which said last-mentioned agreement was dated 27 November, 1911" (Tr. 43-44).

Counsel for appellant, on the *former* appeal, being the appellee on *this* appeal, in their *"Brief on Behalf of Appellant",* pages 21, 37, 38 and 39, stated their contentions and argued upon *this identical point,* as follows:

"On November 27, 1911, H. J. Patterson executed a sublease or assignment of the lease or lay held by him on the Daly Bench to one H. C. Hamilton, transferred to Hamilton all his interest in the lay that he had from James Wickersham, reserving to himself five per cent. (5%) of the gross minerel output thereof (Tr. pp. 39-42). In the said assignment or sublease it is recited:

'That the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining claim above

> described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham *and in his own right as owner of an undivided one-fourth part of the title to said mining claim,* to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915' (Tr. p. 40).

subject to the terms of the Wickersham lease, and obligating Hamilton as follows:

> 'And (Hamilton) shall pay in addition thereto five per cent. of the gross amount of each and every cleanup of gold and gold-dust made by him upon said premises to the said H. J. Patterson' (Tr. p. 41).

"On the evening of the same day, Patterson made and executed a deed from himself to Mariam A. Patterson (Tr. pp. 34-36), for the recited consideration of one dollar ($1.00) of "all his right, title and interest, being an undivided one-fourth interest of, in and to that certain bench placer mining claim, situate in Fairbanks Precinct, Alaska, on the left limit of Ester Creek, and known as the Pat Daly Bench Placer Mining Claim, etc. (Tr. p. 35). There is no assignment in said deed of the rents, issues and profits, and only the bare land is transferred, save and except that the *habendum* clause is as follows:

> 'To have and to hold same, together with the appurtenances and improvements thereon, to and unto the said party of the second part, her heirs and assigns forever' (Tr. p. 35).

"No assignment was ever made to Mariam A. Patterson of the lay or sublease between Hamilton and H. J. Patterson, nor were the rents, issues and profits, or any of the mineral products of said Daly Bench assigned to the defendant Mariam A. Patterson.

"No Assignment Was Ever Made of the Interest of H. J. Patterson in the Lease to Hamilton, and All Royalties That Accrued to Patterson Were the Property of Patterson's Creditors.

"The transfer to Mrs. Patterson was of the bare legal title to the ground and the deed did not contain the ordinary clause transferring the "*rents, issues and profits,*" and this provision being omitted, it can only be presumed that they were intentionally omitted.

"Mrs. Patterson took the bare legal title, subject to the burdens then existing against it, to wit, the payment of the royalties thereafter to accrue to the grantor, her husband."

No. 2411, in this Court; Brief for Appellant, pp. 21, 37, 38 and 39.)

Counsel for Pattersons (then appellees) on the *former* appeal, now the appellants on *this* appeal, disputed this conclusion, and in his able *"Brief on Behalf of Appellee Mariam Patterson"* on *that* appeal, thus stated the facts and argued the case, *on this identical point,* upon the same pleadings, documentary and oral evidence, as follows:

"The property in controversy in this action is an undivided quarter interest in the Daly Bench placer mining claim on Eva Creek, in the Fairbanks Recording District, Alaska, *and the royalties which accrued to said interest* from mining operations carried on by H. C. Hamilton, lessee, after November 27, 1911.

"*Appellant contends* that said quarter interest and *royalties were the property of H. J. Patterson* when he was adjudged bankrupt.

"*The appellee* Mariam A. Patterson *claims* that H. J. Patterson, her husband, never was the real owner of that property; *that she* pur-

chased it with her own money, through her husband, and *is entitled* to the property and *the royalties.*

"When Wickersham delivered to H. J. Patterson a deed to the quarter interest, he also gave him another lease on his, Wickersham's remaining three-fourths of the claim. This lease H. J. Patterson subsequently transferred to H. C. Hamilton, and at the same time, November 27, 1911, he gave Hamilton a lease on the quarter interest, the legal title to which then stood in his, Patterson's name, upon a royalty of five per cent. of the gross output; thereafter H. J. Patterson conveyed the legal title to the quarter interest to his wife. *This conveyance* of the reversion *entitled her to the* rents and *royalties subsequently accruing.*

In re Owsley's Estate, 142 N. W. 134;
West Shore Mills Co. v. Edwards, 33 Pac. 987;
Tiffany on Real Property, secs. 47, 360;
24 Cyc.. 1172;
11 Am. & Eng. Enc. Law (2d ed.) 841."

(Brief of Appellee, pp. 1, 2 and 5; No. 2411 in this Court.)

I.

THE FORMER DECISION OF THIS COURT UPON THE FIRST APPEAL (Patterson v. Stroecker, 220 Federal 21, 25-26) IS THE LAW OF THE CASE UPON THE PRESENT APPEAL, AND FINALLY DETERMINED THAT THE DEED OF PATTERSON TO HIS WIFE DID NOT, AS IT COULD NOT UNDER THE CONDITIONS OF THE LEASES AND AGREEMENTS OF WICKERSHAM AND PATTERSON, CONVEY TO MRS. PATTERSON THE 5 PER CENT. RESERVED TO PATTERSON IN THE ASSIGNMENT OF THESE LEASES AND AGREEMENTS MADE BY HIM TO HAMILTON.

The records and decision of this Court conclusively establish that the appellant on the former

appeal by his complaint and evidence on the trial, asserted a right to recover from and as against the defendant *Mrs.* Patterson (appellant on *this* appeal), based upon *two* propositions:

First. That the deed itself by Patterson to his wife was in fraud of his creditors and should be set aside.

Second. That the *5 per cent. reserved* by Patterson *to himself,* in the lease by him to Hamilton, did *not pass* and was *not conveyed* by the deed from Patterson to his wife, and in fact could not be conveyed or passed to his wife without Wickersham's consent because prohibited by express terms and agreement in Wickersham's lease and agreement with Patterson; that therefore, the appellee here as trustee in bankruptcy was entitled to recover this 5 per cent. as assets of Patterson.

Both propositions were argued by counsel for the trustee, appellant, and by counsel for Mrs. Patterson, appellee.

This Court *decided both* propositions, holding that the *5 per cent. reserved* in the Hamilton lease to Patterson did not and could not pass by the deed of Patterson to his wife; and that there was sufficient evidence in the record as to the fraudulent character of the deed to call for explanation and to be overcome by *Mrs.* Patterson.

When the case went back for retrial, there was no change in the pleadings, and, except that the evidence was *stronger* in favor of Patterson *himself*

owning the 5 per cent. reserved, there was no substantial difference between the record on the present and the former trial, as to the 5 per cent. reserved to Patterson; as to the deed the trial Court found and adjudged that *Mrs.* Patterson was the owner of the quarter interest prior to the adjudication in bankruptcy and that Patterson's deed to her was not in fraud of his creditors.

In Olsen v. North Pacific Lumber Co., 119 Fed. 77, 79, this Court, by Judge *Gilbert,* stated the effect of a former decison reversing the case upon a second appeal.

In Haley v. Kilpatrick, 104 Fed. 647, 648, the Circuit Court of Appeals for the Eighth Circuit, said:

> "This is the *second* appearance of this case in this Court (66 Fed. 133). For a statement of the questions involved we refer to our former opinion. The *law of the case* was settled in the opinion of the Court when the case was first here. It remains the law of the case in this Court.
>
> "It is well settled that a second appeal or writ of error in the same case only brings up for review the procedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question either of law or fact which was considered and determined on the first appeal or writ of error. Bridge Co. v. Stewart, 3 How. 413, 425, 11 L. Ed. 658; Sizer v. Many, 16 How. 98, 14 L. Ed. 861; Tyler v. Magwire, 17 Wall. 253, 283, 21 L. Ed. 576; Phelan v. City & County of San Francisco, 20 Cal. 39, 44; Leese v. Clark, Id. 388. In the last case cited Mr. Justice Field, then chief

Justice of the Supreme Court of California, delivering the unanimous judgment of that court, said:

'The decision of this court on the first appeal became the law of the case, and fixed the right of the parties in this action under their respective grants.' 'A previous ruling of the appellate Court,' as we held in Phelan v. City & County of San Francisco, 'upon a point distinctly made, may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; *but in the case in which it is made it is more than authority; it is a final adjudication,* from the consequences of which the court cannot depart, nor the parties relieve themselves.' 20 Cal. 39. Such has been the uniform doctrine of this court for years, and, after repeated examinations and affirmations, it cannot be considered as open to further discussion. See Dewey v. Gray, 2 Cal. 377; Clary v. Hoagland, 6 Cal. 687; Gunter v. Laffan, 7 Cal. 592; and Davidson v. Dallas, 15 Cal. 82. Nor is the doctrine peculiar to this court. *It is the established doctrine of the supreme court of the United States* and of the supreme courts of several of the states. Sibbald v. U. S., 12 Pet. 491, 9 L. Ed. 1167; Bridge Co. v. Stewart, 3 How. 413, 11 L. Ed. 658; Russell v. La Roque, 13 Ala. 151. And the reason of the doctrine is obvious The supreme court has no appellate jurisdiction over its own judgments. It cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control. It construes, for example, a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration. Whether right or wrong, it has become the law of the case. This

> will not be controverted. So, on the other hand, if *upon the construction of the contract supposed,* this court *reverses* the judgment of the court below, and orders a new trial, the decision is *equally conclusive* as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case, and reverse its decision, after the remittitur is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone; and, if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below. Young v. Frost, 1 Md. 394; McClellan v. Crook, 7 Gill 333.'
>
> "No new questions going to the merits of the case were raised on the second trial."

In Board of Commissioners v. Geer, 108 Federal 478, the same Court said:

> "The judgment of this Court on the first writ of error is the law of this case, from which, under well settled authority, we could not, if we would, depart. Balch v. Haas, 73 Fed. 974; Haley v. Kilpatrick, 104 Fed. 647, and cases cited. We cannot, therefore, consider any question which was *necessarily involved in and determined* at the former hearing of this case. An examination of the record on file in this Court shows that the two most prominent assignments of error *argued* at the first hearing were," etc.

In Town of Fletcher v. Hickman, 208 Federal 118, 121, the Circuit Court of Appeals for the Eighth Circuit, said:

"This court, however, directly decided and clearly declared that the court below was in error in admitting any of the evidence of no publication of the ordinance for any purpose, and that its judgment should have been for the plaintiff upon all the bonds and coupons. That decision is now the law of this case. The issues and the evidence at the second trial differ in no material respect from those at the first trial. A legal propositon once considered and decided in a given cause by an appellate court may not be again questioned in that court on a subsequent writ or appeal to review a subsequent trial of the same case on the same issues and evidence. Such propositions are res adjudicata between the parties to that suit and their privies and constitute the law of the case. Thompson v. Maxwell Land Grant & Railway Co., 168 U. S. 451, 456, 18 Sup. Ct. 121, 42 L. Ed. 539; Guarantee Co. of North America v. Phenix Ins. Co., 124 Fed. 170, 174, 59 C. C. A. 376, 380; Balch v. Haas, 73 Fed. 974, 20 C. C. A. 151; Thatcher v. Gottlieb, 59 Fed. 872, 8 C. C. A. 334; Board of Com'rs v. Geer, 108 Fed. 478, 47 C. C. A. 450; Denver & Rio Grande R. R. Co. v. Arrighi, 141 Fed. 67, 72 C. C. A. 400; Mutual Reserve Fund Life Ass'n v. Ferrenbach, 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163; Crotty v. Chicago Great Western Ry. Co., 169 Fed. 593, 596, 95 C. C. A. 91."

Also, Guarantee Co. of America v. Phenix Ins. Co., 124 Fed. 170, 174.

II.

UNDER THE LEASES AND AGREEMENTS BETWEEN PATTERSON AND WICKERSHAM, PATTERSON WAS PROHIBITED FROM ASSIGNING AND SPECIALLY AGREED NOT TO ASSIGN THE LEASE OR LAY OR ANY INTEREST THEREIN OR THEREUNDER, OR SUBLET OR SUBLEASE ANY PART OF THE PREMISES, NOR PERMIT SAME, OR ANY PART OR ANY INTEREST THEREIN TO PASS TO ANY PERSON WHATEVER, WITHOUT WICKERSHAM'S CONSENT, AND THAT SUCH PROHIBITION SHALL EXTEND TO THE UNDIVIDED ONE-FOURTH INTEREST AS FULLY AS TO HIS THREE-FOURTHS; THEREFORE PATTERSON'S DEED TO HIS WIFE NOT ONLY DID NOT BUT COULD NOT PASS ANY INTEREST THEREIN TO HIS WIFE, AND IF IT DID, AS TO SUCH INTEREST WOULD BE VOID IN THE ABSOLUTE SENSE.

On this point we again quote from the opinion of this Court on the former appeal, Patterson v. Stroecker, 220 Federal 21, 25, as follows:

> "Shortly before the execution of that compromise agreement, to wit, October 12, 1911, Wickersham has executed to H. J. Patterson a second lease of the Daly Bench claim for a term extending to October 12, 1915, reciting, among other things, the ownership by Wickersham of the undivided three-fourths thereof and the ownership of H. J. Patterson of the remaining one-fourth, and reciting that Patterson had applied to Wickersham for a lease covering the entire claim upon certain terms and conditions, which Wickersham thereby granted; the instrument further reciting, among other things, that:
>
> > '*As part consideration of this lease* the party of the second part [H. J. Patterson] agrees that his undivided *one-fourth interest* in said premises *shall be covered* and included in the terms of this lease, and shall also at

all times be subject to any debts, defaults, or damages resulting from the working under this lease, or for violation thereof, and the said Daly *claim shall at all times be worked and considered as a whole* between the parties hereto, and *all subject* to the terms of this lease; and it is especially agreed that the party of the first part [Wickersham] shall have a first lien upon the whole of the output of the whole of the Daly claim, *including the undivided one-fourth interest of the party of the second part,* for the payment of the royalty reserved to the party of the first part *and* the performance of the terms of this lease.'

"The last-mentioned instrument further imposed upon the lessee the obligation to begin work upon the leased property within 30 days from its execution, and thereafter to continuously maintain possession of the property and mine the same in a good and minerlike manner, and, among various other terms and conditions, the following:

'And the party of the second part [H. J. Patterson] does hereby *specially agree not to assign this lease or lay, or any interest therein or thereunder,* and not to sublet or sublease the said demised premises, or any part thereof, *nor to permit the same, nor any part thereof, nor any interest therein, to pass to any other person whatever, without the written consent of the* party of the first part [Wickersham] had and obtained, and *this prohibition shall extend to the undivided one-fourth interest belonging to the party of the second part as fully as to the interest belonging to the party of the first part.'*

"The deed from Wickersham to H. J. Patterson of the one-quarter interest in the claim was made October 14, 1911, and contained this recitation:

> 'Said conveyance is made in consideration of the doing of the assessment work thereon by the vendee in the year 1910, in compliance with the United States statute.'
>
> "That deed was recorded at the request of Patterson. The deed from the latter to his wife was made November 27, 1911, expressing a consideration of $1 and quitclaiming to her 'all his right, title, and interest, being an undivided *one-fourth interest,*' in the Daly Bench claim."

Under the *express agreement* of Wickersham and Patterson in this lease of October 12, 1911, *prohibiting* assignment, sub-letting or sub-leasing, or *the passing of any part or interest* therein *to any other person whatever,* without consent of Wickersham, and imperatively ("shall") making this *prohibition* "extend to the undivided *one-fourth interest* belonging to" Patterson *"as fully* as to the interest belonging to" Wickersham (Tr. 62; 56-64), Patterson did not have the legal power or authority to pass or convey to his wife the 5 per cent., reserved to him in his assignment to Hamilton; and even if Patterson had, in express terms, conveyed or passed to his wife his interest under the Wickersham and Hamilton lease, such conveyance and transfer would be null and void.

This Court has fully and clearly declared the rule of law governing such *prohibitions against assignment,* etc., contained in contracts, in the recent cases of

> Welles v. Portuguese American Bank, 211 Fed. 561;

Welles v. Portuguese American Bank (rehearing), 215 Fed. 81;
Portuguese American Bank v. Welles, 37 Sup. Ct. Rep. 3.

III.

WICKERSHAM AND PATTERSON AGREED THAT BY WICKERSHAM'S DEED TO PATTERSON THE BARE LEGAL INTEREST ONLY IN THE ONE-QUARTER SHOULD PASS TO PATTERSON, AND THAT PATTERSON COULD AND WOULD CONVEY ONLY THE BARE LEGAL TITLE; AND ALL OF THE EVIDENCE SHOWS THAT WAS THE PURPOSE AND INTENTION OF WICKERSHAM, OF PATTERSON AND OF MRS. PATTERSON, AND EFFECT OF THE DEED BY PATTERSON TO HIS WIFE, AND THAT NO INTEREST IN OR UNDER THE LEASE OR LAY OR THE ROYALTIES FROM WORKING THE SAME, SHOULD EVER PASS TO OR VEST IN MRS. PATTERSON.

The documentary evidence and the testimony of the witnesses found in the record on the present appeal, also in the record on the former appeal, conclusively show:

First. That Wickersham conveyed to Patterson, by express understanding between them when the deed was delivered, that the *"bare legal title"* only, in the quarter interest, would pass and be conveyed by the deed to Patterson.

Mrs. Patterson's *answer,* paragraph "4" (Tr. 15; Former Appeal, Tr. 14-15) expressly alleges:

> "* * * the said Wickersham did make such deed to said H. J. Patterson, and delivered the same to said Patterson on November 10, 1911,

> *but with the express understanding* had between said Wickersham and said Patterson, that the latter would convey *the bare legal title* to said quarter interest, *so received* by him, *to this defendant"* (Tr. 15); *Patterson's* Answer, the same (Tr. 21; Former Tr. 20-21).

She admits, in her answer, that on the morning of November 27, 1911, "the *bare legal title",* was conveyed to Patterson and that the same evening Patterson conveyed *to her "the bare legal title"* to said quarter interest and that *prior* thereto, Patterson had lay or lease from Wickersham, and that Patterson *assigned* said lease to Hamilton (Tr. 11-12; Former Tr. 11-12).

The *lease* made by Wickersham would *expire* on October 12, 1915 (Tr. 58), and the *assignment* made by Patterson to Hamilton was for the *same time* (Tr. 72).

She expressly alleges, that Patterson received from Wickersham *"the bare legal title* to said quarter interest for the sole purpose of conveying same to her, and on November 27, 1911, he did execute a deed to her "for the *sole purpose* of transferring to her *the bare legal title* then standing in his name", and, that *she* "then and there *received the bare legal title* to said interest" (Tr. 12; Former Tr. 11).

In all *her* testimony, she declares that Patterson agreed to

> "give me the *quarter* interest" (Tr. 150), "if I would do the work necessary to *acquire the quarter* interest" (Tr. 150). "We thought *the*

quarter interest would be cheap at that" (Tr. 150). "I regarded myself as entitled to the deed to *the quarter* interest * * * because I had fulfilled my part of our contract to acquire *the quarter* interest" * * * "Judge Wickersham never objected to my being the owner *of the quarter* interest after he knew that the deed to *the quarter* interest had been made to me. * * * He never stated to me that Mr. Patterson was forbidden from conveying that *quarter* interest to me" (Tr. 151). "I considered that I was the owner of the *quarter* interest" (Tr. 153).

On *her* deposition and the second trial she testified:

"A. Harry had the lay and I owned the ground.

Q. Didn't you, during the time I have mentioned, and prior to the 27th of November, 1911, continually, in talking with some of your friends, speak of that ground as the ground that Harry owned on Ester Creek?

A. No. I always said 'we', 'our ground on Ester'.

Q. You didn't speak of it as your ground?

A. Because he had the lay and I had the interest, so I said 'we' " (Tr. 155).

"Q. And that you consented to it.

A. *Yes.* I presume *I did say* when my deposition was taken at the time you referred to *that I did not have anything to do with the gold produced after the lease was assigned over to Mr. Hamilton and that my consent was not asked at the time of the assignment of the lay to him"* (Tr. 157).

Nowhere in the whole record did she ever speak of anything being conveyed to her, except the *bare legal title* to this undivided *quarter* interest; and she

knew that the *bare legal title* to the *quarter* interest and the *lease* or lay were absolutely *separate* rights, the *one* the bare legal title to the *quarter* interest, belonging to her, the *other* the *lease* or lay, although the quarter interest was subject to it from the date of the lease to the date of the expiration of the lease, yet, the lease or lay itself belonged to Patterson, her husband, and that she never had, never received, and never had any agreement to have or receive, and under the lease and agreement of Wickersham and Patterson, that *she* could not have or receive without the consent of Wickersham, any interest or right whatever in or to the lease or lay or the proceeds thereof. That is why she so testified, always, as to *her quarter* interest *in the claim,* and that *she*

> "did *not* have anything to do *with the gold produced after the lease* was *assigned* over to Hamilton and that her consent was *not asked* at the time of the assignment of the lay to him" (Tr. 155; Tr. 157).

Patterson's testimony also deals only with the *quarter* interest—that Wickersham and he agreed on a quarter interest *and* a 75% lay, and he told his wife *she* could have *the quarter* interest, if she would pay for sinking the hole to bedrock, as *he* would need all the money *he* had *to open up* the ground (Tr. 94). *Patterson* declared: "*I* considered a 75% *lay* on the ground very much *more* valuable *than a quarter* interest in the property. *I* was particularly concerned about *the lease* on the property" (Tr. 96). *Mrs.* Patterson corroborates

this intention and purpose, of Patterson to get the lease or lay *for himself,* and of *Mrs.* Patterson to get the *bare* legal title to the *quarter* interest, which quarter interest at the *end* of the lease in October, 1915 (Tr. 58) *she* would own in absolute right; and *she* declares:

> "I came to pay for sinking those drill holes in this way: Mr. Patterson said he believed he would go to town and see if he could get *a half interest* in the Daly bench from Judge Wickersham *for sinking some holes or doing some assessment* work on the Daly bench; Judge Wickersham did *not consent to give him a* half interest but told him he *would* give a *quarter* interest *and* a 75% lay; then, as *he* had only a very little money himself and he wanted to use that for *mining* purposes, he told me that *if I* would pay for sinking the holes and do the work necessary *to acquire* the quarter interest, he would give me *the quarter* interest; so I consented" (Tr. 149-150).

Confirming all this, and demonstrating the absolute separation of the lease or lay *and* the bare legal title to the quarter interest, is the *deed* by Wickersham to Patterson of the *quarter* interest, reciting:

> "Said conveyance *is made in consideration* of the doing of the *assessment work* thereon by the vendee in the year 1910, in compliance with the United States statute" (Tr. 70).

Second. The very *terms* of the *lease* itself show its separation from the *bare* legal title of the quarter interest, while *subjecting* the quarter interest absolutely to the lease and the rights and liabilities of Patterson, the lessee thereunder.

This lease or lay will be found in the transcript, pages 56 to 65; and, among other conditions, declares:

> "The party of the first part (Wickersham) does hereby grant, devise and lease unto the said party of the second part (Patterson), the party of the second part does hereby accept the lease of *the whole* of the said premises together with all appurtenances and the right and privilege to prospect and mine the same and to extract therefrom all the gold and gold-bearing placers therein contained subject to the terms of this agreement:
>
> "To have and to hold the same unto the said party of the second part from the date of this agreement until the 12th day of October, 1915, unless sooner determined or forfeited through the failure of the party of the second part to pay and deliver the rents and royalties agreed upon, or for other violation of the terms, covenants and conditions in this lease, or the agreement of even date herewith, against the said party of the second part reserved.
>
> "*As part consideration* of this lease the party of the second part agrees that *his undivided one-fourth interest* in said premises *shall be covered and included* in the terms of this lease and shall also at all times be subject to any debts, defaults or damages resulting from the working under this lease, or for violation thereof and the *said Daly claim shall at all times be worked and considered as a whole* between the parties hereto, and *all subject to* the terms of this lease and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, *including the undivided one-fourth interest* of the party of the second part for the payment of the royalty reserved to the

party of the first part and the performance of the terms of this lease" (Tr. 57-58).

IV.

AUTHORITIES CITED BY APPELLANT ARE NOT IN POINT. IT WAS THE INTENTION, PURPOSE AND SUCH WERE THE TERMS OF THE WICKERSHAM LEASES AND AGREEMENT WITH PATTERSON, AND OF THE ASSIGNMENT BY PATTERSON OF THESE LEASES AND AGREEMENT TO HAMILTON, AND OF WICKERSHAM BY HIS DEED TO PATTERSON, AND PATTERSON AND MRS. PATTERSON BY HIS DEED TO HER, THAT ONLY THE BARE LEGAL TITLE TO THE QUARTER INTEREST SHOULD PASS TO PATTERSON AND FROM HIM TO HIS WIFE.

None of the authorities cited by appellant in any manner decide or affect the questions in dispute here. They deal with the ordinary cases of transfers to lessees, merging the fee in the lessee or by the lessors to third persons, creating necessarily the legal duty of attainment by tenants to grantees of their lessors or rights of grantees to receive rents, etc., under transfers of lessors. None of these cases exhibit any intention or statement that the grantor who is both lessee and tenant in common as owner of an interest, under a lease covering the lessees' interest and the lessors', containing provisions *prohibiting* drastically any transfer or assignment of any part of the lease or of the leased premises, and subjecting the interest in the premises of the tenant in common lessee, to each and every provision of the lease, and providing for the *use,* and

operation of the premises *as a whole,* and who conveys only his interest in common, but in no manner conveying or referring to his interest as lessee, passes to such grantee his interest as lessee under such a lease; and obviously that result could not follow such a conveyance, because, among other reasons, such grantee of the interest must fill the shoes of the tenant in common lessee, which such grantee could not fill, unless by *consent* of all parties.

It is respectfully submitted, the parts of the decree appealed from should be affirmed.

Dated, San Francisco,
June 22, 1917.

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